

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JEANNE A. NICHOLS and)	
RAYNOLD B. NICHOLS,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 01-232-B-S
)	
CONTINENTAL AIRLINES,)	
)	
Defendant)	

ORDER ON MOTION IN LIMINE¹

Continental Airlines, Inc., the defendant in this diversity action, has filed a motion in limine to exclude the expert testimony of Russell Robison, the proposed airline cabin safety expert of the two plaintiffs, Jeanne Nichols and Raynold Nichols. Because Robison's opinions as set forth in his deposition testimony do not meet the threshold requirements of Federal Rule of Evidence 702, I **GRANT** the motion.

Discussion

This case is about a trip-and-fall accident during an airline flight. Jeanne Nichols, a passenger on a flight between Houston, Texas and Tucson, Arizona, fell when she apparently tripped over the legs of another passenger that were extended into the aisle. Nichols left her seat to visit the restroom in the aft section of the plane, approximately at midnight. Most passengers on the plane were sleeping and the main cabin lights had been turned off and the galley lights were dimmed. Nichols' designated expert, Russell Robison, opines that Continental was negligent because (1) the cabin was not sufficiently

¹ Pursuant to Fed. R. Civ. P. 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

lit; (2) the flight attendants did not conduct adequate “walk-throughs”; and (3) the seat pitch resulted in overcrowded space, causing long-legged passengers to resort to stretching their legs in the aisles. Robison contends that Continental’s conduct vis-à-vis these three logistical concerns was in violation of the Federal Aviation Act of 1958 and regulations promulgated pursuant thereto. The specific rules and regulations Robison claims were violated were those rules that require air carriers to perform their services “with the highest possible degree of safety” and to assume “the ultimate responsibility for [passenger] safety.”

Federal Rule of Evidence 702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Nichols does not argue that Robison’s testimony is scientific or technical, but rather she urges that his knowledge of the Federal Aviation Act of 1958 and the Code of Federal Regulations is “specialized knowledge” about the standard of care applicable to the aviation industry.

Robison’s testimony about the lighting in the aircraft, based upon largely undisputed eyewitness accounts, is that the indirect lights and aisle lights were turned off and the only lights in use were occasional individual passenger lights, individual seat belt signs, and the overhead exit signs. He agrees that such lighting was in accordance with Continental’s standard policies and procedures for late night flights. He contends it was

too dark for Jeanne Nichols to see obstructions in the aisles because obviously she did not see what caused her to trip.

Robison also declares that the flight attendants were inattentive because they did not perform frequent enough “walk-throughs” to keep the aisles clear of obstructions. Robison acknowledges that Continental’s policy and procedures calling for “walk-throughs” every fifteen minutes on night flights was in accordance with the applicable FAA minimum. However, he also concluded that Continental breached the standard of care because the “walk-throughs” were not frequent or thorough enough to prevent the other passenger’s legs from winding-up in the aisle.

Robison’s third and final contention is that the pitch of the seats is too narrow, resulting in passenger discomfort and increasing the probability that tall passengers will put their legs in the aisles. Robison testified at his deposition that the pitch of the seats on this MD-80 was probably thirty-one inches, based upon the interior specifications for a McDonnell Douglas MD-80. He acknowledged that he had not measured the seat pitch on this particular aircraft and did not know the dimensions involved. Robison has conducted no tests regarding the ergonomics of seat design nor is he familiar with the research that has been done in the field. He based his conclusion that financial considerations prompted Continental to move the seats closer together to increase seating on an article he read in Conde Nast’s Travel magazine and his personal experience flying in airlines.

“Federal Rule of Evidence 702 imposes an important gatekeeper function on judges by requiring them to ensure that three requirements are met before admitting expert testimony: (1) the expert is qualified to testify by knowledge, skill, experience,

training, or education; (2) the testimony concerns scientific, technical, or other specialized knowledge; and (3) the testimony is such that it will assist the trier of fact in understanding or determining a fact in issue.” Correa v. Cruisers, __ F.3d __, 2002 WL 1587039, *7 (1st Cir. July 23, 2002) ;See also Fed. R. Evid. 702; Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 592 (1993) (discussing trial judge's role in screening scientific expert testimony for reliability and relevancy); Diefenbach v. Sheridan Transp., 229 F.3d 27, 30 (1st Cir. 2000) (setting forth three requirements of Rule 702). In Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137 (1999) the United States Supreme Court made clear that the trial judge’s “gatekeeping” obligation vis-à-vis expert testimony applies not only to “scientific” knowledge, but also to “technical” or “other specialized knowledge.” Id. at 141. The trial court must remember that “[t]he ultimate purpose of the [expert evidence] inquiry is to determine whether the testimony of the expert would be helpful to the jury in resolving a fact in issue.” Cipollone v. Yale Indus. Prod., Inc., 202 F.3d 376, 380 (1st Cir. 2000); accord Hochen v. Bobst Group, Inc., 290 F.3d 446, 452 (1st Cir. 2002) (quoting Cipollone).

For the following reasons I find that Robison’s testimony, whether it is characterized as “specialized knowledge” about the applicable standard of care or as “technical knowledge” about lighting, “walk-throughs,” and seat pitch, fails to meet the reliability and relevancy thresholds of Rule 702.

Robison’s “specialized knowledge” regarding FAA regulations turns out to be little more than standards articulated in well-established case law requiring a common carrier to exercise the highest duty of care toward its passengers. For instance, the Maine Law Court has stated: “A common carrier owes its passengers a duty that requires the

exercise of the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken." Mastriano v. Blyer, 2001 ME 134, ¶13, 779 A.2d 951, 954 (Me. 2001) (quotations and citations omitted). Robison, on the other hand, references the Federal Aviation Act of 1958 for the proposition that an airline must perform its duties with the highest possible degree of safety in the public interest. Given the similarities between the accepted common law standard of care and the one proffered by Robison, Robison's "specialized knowledge" of the Act and the regulations will do little to assist the jury in determining the facts in dispute. Instructions on the law are the trial judge's obligation.

Robison's testimony regarding the lighting and the "walk-through" is likewise of little aid to the jury. "Nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). In the present case Robison opines that it was too dark in the plane and the flight attendants did not do adequate "walk-throughs" because in his opinion Nichols would not have fallen if there had been enough light and attentive flight attendants. This is no more than an, "I say it; therefore it is so" averment. Robison's testimony provides the jury with no assistance as to how dark it was in the plane. Lay witnesses who were actually present can describe the degree of darkness and the jury can sort it out based on common experience. Likewise the jury can determine if more frequent and attentive "walk-throughs" would have prevented the accident. An "expert" adds nothing on these issues.

The seat pitch is a more specialized field of technical knowledge. While Robison has training in aircraft cabin safety relating primarily to overhead bins and storage during

flight, his testimony regarding seat pitch lacks technical reliability. Robison has not even examined the seat pitch in this particular aircraft nor does he have any background in evaluating the ergonomics of proper seat pitch. He concludes that the seat pitch was thirty-one inches based upon the available MD-80 generic specifications. He acknowledges that he does not actually know what modifications, if any, Continental may have made to this particular aircraft. His conclusion that a tall person experiences leg discomfort sitting in an airplane and extends his leg into the aisles for relief is hardly beyond the experience of the ordinary juror who has flown in an airplane, ridden a bus, or attended a lecture or concert in a crowded hall.

Robison seems to suggest that Continental has some special responsibility for the crowded conditions on this particular MD-80 because in the last few years it has narrowed the seat pitch to add more seats to the aircraft based upon financial considerations. Robison bases this conclusion on an article from a popular travel magazine. Nichols, of course, can establish through a myriad of means the actual configuration of the seats on this particular aircraft and Continental's responsibility for arranging the seats in that particular fashion. Robison's technical expertise will provide the jury with no assistance in finding facts or drawing inferences relevant to the issues in this case. His testimony should be excluded.

So Ordered.

July 23, 2002.

Margaret J. Kravchuk
U.S. Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-232

NICHOLS, et al v. CONTINENTAL AIRLINES
11/19/01
Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: \$0,000
Lead Docket: None
Dkt # in Somerset Cty Sup Ct : is CV-01-070

Filed:
ury demand: Plaintiff
Nature of Suit: 310
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Notice of Removal

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